Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES B. PRATER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's trial on income tax, currency structuring, and embezzlement charges was rendered fundamentally unfair by the prejudicial spillover imported by the embezzlement charges that 1) were unsustainable as a matter of law; 2) were employed by the prosecution to discredit Petitioner, impairing his good faith defense; 3) were ratified by the trial court, which instructed the jury on embezzlement as it applied to Petitioner; and 4) were finally dismissed by the trial court after the jury convicted Petitioner on the embezzlement counts?

TABLE OF CONTENTS

Page

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. Course Of The Proceedings And Disposition Below 2

2. Statement Of The Facts 3

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI 5

1. The Petitioner did not receive a fair trial because the trial court allowed the prosecution to proceed with, and the jury to deliberate on, the legally unsustainable counts of embezzlement 5

A) The trial court did not and could not substantiate the legal basis for the embezzlement counts 5

B) The jury trial on the embezzlement counts, 18 U.S.C. §§ 371 & 660, prejudiced Petitioner's defense to the remaining counts 6

C) The Opinion by the Eleventh Circuit Court of Appeals improperly relied on *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000) to analyze the "prejudicial spillover" of the embezzlement counts 9

D) Existing law addressing prejudicial spillover is deficient and in conflict within the Circuits 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Cheek v. United States, 498 U.S. 192, 111 S. Ct. 604 (1991) 8

State v. Harris, 164 A.2d 399 (1960) 5, 6

State v. Kornegay, 326 S.E.2d 881 (N.C. 1985) 5

State v. Stities, 297 P.2d 227 (1956) 6

United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998) 13

United States v. Bailey, 14 F.3d 1557 (11th Cir. 1994) 14

United States v. Eason, 920 F.2d 731 (11th Cir. 1990) 14

United States v. Griffith, 2002 U.S. App. LEXIS 4519 (2nd Cir.) 11

United States v. Ivic, 700 F.2d 51 (2nd Cir. 1983) 12

United States v. Jones, 16 F.3d 487 (2nd Cir. 1994) 12

United States v. LeQuire, 943 F.2d 1554 (11th Cir. 1991) 14

United States v. Mills, 138 F.3d 928 (11th Cir. 1998) 14

United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999) 12

United States v. Prosperi, 201 F.3d 1335 (11th Cir. 2000) 9, 10, 12

United States v. Rooney, 37 F.3d 847 (2nd Cir. 1994) 9, 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986) 14

United States v. Veltmann, 6 F.3d 1483 (11th Cir. 1993) 14

United States v. Young, 39 F.3d 1561 (11th Cir. 1994) 14

CONSTITUTIONS

U.S. Const. amend. V 1

U.S. Const. amend. VI 1

STATUTES

18 U.S.C. § 371 ..... 2, 6

18 U.S.C. § 660 ..... 2, 5, 6

28 U.S.C. § 1254(1) 1

RULES OF EVIDENCE

Fed. R. Ev. 404(b) 14

MISCELLANEOUS

Black's Law Dictionary 77 (6th ed. 1991) 6

Black's Law Dictionary 522 (6th ed. 1991) 8

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Charles Prater respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The Eleventh Circuit Court of Appeals issued its opinion in this case on June 6, 2001. On January 24, 2002, the Eleventh Circuit Court of Appeals denied the Petition for Rehearing and for Rehearing En Banc. (Appendix A).

JURISDICTION

This Court has jurisdiction to consider this case by way of a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part: No person shall be . . . deprived of life, liberty or property without due process of law.

This case involves the Sixth Amendment to the United States Constitution which provides in pertinent part: In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation.

This case also involves 18 U.S.C § 660, embezzlement and theft of carrier funds derived from commerce, which provides in pertinent part: Whoever, being a president, director, officer, or manager of . . . [a] corporation engaged in commerce as a common carrier . . . embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys . . . of such . . . corporation arising . . . from . . . such commerce.

STATEMENT OF THE CASE

1. Course Of The Proceedings And Disposition Below

On October 16, 1995, Petitioner Charles Prater ("Petitioner") and co-defendant Lynnwood Warmack ("co-defendant") were indicted for embezzlement, currency structuring, tax evasion, and obstruction of justice all in connection with their ownership and management of Carpet Transport, Inc. ("CTI"). Specifically, in a fifty-five count indictment, Petitioner was charged with conspiracy to embezzle money in violation of 18 U.S.C. § 371 (Count 1); six counts of embezzlement in violation of 18 U.S.C. § 660 (Counts 2 through 7); four counts of violating the currency transaction structuring laws (Counts 8 through 11); false reporting on his corporation's tax returns (Counts 41 and 43); false reporting on his personal income tax returns for 3 years (Counts 28 through 33); and three counts of obstruction of justice (Counts 47

through 49). The obstruction counts only applied to Petitioner.

On March 16, 1998 after a nine-week trial, the jury returned its verdict, finding the Petitioner guilty of embezzlement, of currency structuring and of income tax evasion, and not guilty of obstruction of justice. Petitioner and another co-defendant, William J. Plemons, filed post-trial motions for judgment of acquittal and motions for new trial. After a hearing on May 18, 1998, the trial court granted Petitioner's Motion for Judgment of Acquittal on the embezzlement counts. On June 30, 1998, Petitioner was sentenced to a prison term of 41 months.

Petitioner timely appealed his convictions, raising three issues: 1) the prejudicial spillover caused by the inclusion of counts 1-7; 2) sufficiency of the evidence as to the structuring counts; and 3) the "sophisticated means" enhancement applied by the trial court in sentencing. On June 6, 2001, the Eleventh Circuit issued its opinion, reversing currency structuring counts but affirming all other issues. On January 24, 2002, the Eleventh Circuit Court of Appeals issued the Order Denying the Petition for Rehearing and for Rehearing En Banc.

2. Statement Of The Facts

The opinion by the Court of Appeals correctly recites the facts. In essence, the Petitioner and his co-defendant were the sole owners of CTI, a large trucking company in northwest Georgia. The government alleged that Petitioner, his co-defendant, and others conspired to embezzle money from CTI. In the process, Petitioner is alleged

to have committed income tax violations, structured currency transactions, and obstructed justice.

Prior to and during the trial, defense counsel briefed and argued that the Petitioner and his co-defendant could not be found guilty of embezzling from their own company. The evidence was undisputed that Petitioner and his co-defendant were the sole shareholders of CTI and that they mutually consented to the disbursements. With little elaboration, the prosecution argued that the corporate ownership did not control the embezzlement counts and that Petitioner and his co-defendant could embezzle funds from CTI.

Throughout the trial, the prosecution relied on the embezzlement counts to discredit the Petitioner. During opening statements, the prosecution labeled Petitioner as a "crook," a "thief" and someone who "embezzled" from CTI. Despite trial counsel's repeated challenges, the trial court refused to dismiss the embezzlement counts. The trial court instructed the jury on the embezzlement counts and allowed the jury to deliberate on these charges. After a guilty verdict was returned on the embezzlement counts, the trial court finally quashed this theory of self-embezzlement.

Granting Petitioner's motion for judgment of acquittal on the embezzlement counts, the trial court concluded that the evidence was insufficient to support these charges. The trial court explained that law supported the prosecution's theory of self-embezzlement. However, in its Order, the trial court only cites state law cases to support the theory of self-embezzlement.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

1. **The Petitioner did not receive a fair trial because the trial court allowed the prosecution to proceed with, and the jury to deliberate on, the legally unsustainable counts of embezzlement.**

   A) The trial court did not and could not substantiate the legal basis for the embezzlement counts.

Neither the prosecution nor the trial court has identified a single federal case under 18 U.S.C § 660, which holds that sole shareholders of a corporation may be guilty of embezzling funds from their corporation. In its order reversing the embezzlement convictions, the trial court cites several state law cases to support this theory of embezzlement. However, these cases are either clearly distinguishable, inapposite, or simply contrary to prosecution's theory of self-embezzlement.

In *State v. Kornegay*, 326 S.E.2d 881, 899 (N.C. 1985), the court's holding was premised on the defendant's embezzlement with the intent to deceive his associates. The court reasoned that the North Carolina statute was violated where corporate officers "embezzle or misapply corporate funds with the intent to injure, defraud, or deceive another." *Id.* at 899. In *State v. Harris*, 164 A.2d 399, 402 (1960), the court's decision clearly contemplated an embezzlement that injures those dealing with the corporation – not the corporation itself.

The case of *State v. Harris*, 39 A.2d 311, 319 (1960), is distinguishable because the two corporate entities were

insurance companies, which are "subject to rigid supervision and control by the State for the benefit of such of the public as might be policyholders." *Id.* Similarly, *State v. Stities*, 297 P.2d 227, 229 (1956), is distinguishable because the defendant was not the sole shareholder of the corporation.

A common denominator of each of these cases is a party apart from the "embezzler" was adversely impacted by the theft. These parties may be shareholders, creditors, or the general public. Importantly, in this case, the prosecution never pretended or asserted that these injured parties existed. Even corporate law theory does not favor this theory of self-embezzlement. The corporate "alter ego" regards the shareholders as the corporation in instances of fraud. Black's Law Dictionary 77 (6th ed. 1991). If Petitioner and his co-defendant represented the alter ego of CTI, then the prosecution's theory borders on absurd: by embezzling from CTI, Petitioner and his co-defendant embezzled money from themselves.

B) The jury trial on the embezzlement counts, 18 U.S.C. §§ 371 & 660, prejudiced Petitioner's defense to the remaining counts.

The question presented by this appeal is whether the effect of being tried on the embezzlement charges, having no basis in law or fact, rendered the trial for income tax evasion fundamentally unfair. This indictment was 108 pages. Of these 108 pages, approximately 47 pages were dedicated to counts 1-7, the embezzlement charges. Basic math provides that 43% of the indictment applied to

articulating these counts. The embezzlement allegations were not insignificant to the prosecution's case.

The prejudicial spillover is evident in several respects. First, Petitioner was tried as a conspirator and an embezzler, not as a simple income tax delinquent. Second, the embezzlement counts provided the prosecution a moral trampoline from which to sprang its theory of the case: Petitioner, his co-defendant, and others "conspired to steal approximately 3.5 million dollars from Carpet Transport Incorporated." Third, in the eyes of the jury, the trial court implicitly endorsed this theory of self-embezzlement by instructing the jury on these counts. As a result, Petitioner was deprived of that organic presumption of innocence that criminal defendants are guaranteed. In its stead, Petitioner was forced to defend against a legal nullity – having no boundaries, definitions, or restrictions.

During trial, the trial court even remarked on the implausibility and confusion of the embezzlement counts:

> "Seems to me it ought to be obvious to the Government that tacking it on a tax case and trying to make it something different from a tax case and the effort being made to assert this as a criminal act on behalf of shareholders is just so difficult to absorb and so inconsistent with what most people including corporate lawyers think the law is and it just looks like to me it greatly confuses the issue as far as what a fact finder is going to do."

Still, the jury was instructed that it could find Petitioner guilty of the offense of embezzlement.

In a tax prosecution, the effect of being wrongfully characterized as an embezzler can only be profound. As a defense to the tax counts, Petitioner consistently asserted that he, in good faith, believed he was complying with the tax laws. Petitioner did not seriously contest that CTI, in fact, received the income. Instead, Petitioner claimed that the "embezzled" money was used to pay corporate expenses and therefore, no tax was due (all income was offset with a corresponding expense of the corporation). Believing the transactions were a wash, Petitioner did not report the receipt of these monies to his accountant. In short, Petitioner attempted to avail himself of the good faith defense – an absolute defense to the tax charges. *See Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604 (1991).

By definition, one who embezzles does so by "intentional and fraudulent appropriation or conversion of money." Black's Law Dictionary 522 (6th ed. 1991). By injecting the embezzlement counts, the jury was placed in the position of having to believe that an embezzler, in good faith, attempted to comply with the income tax laws. After hearing the Petitioner labeled a thief and crook; after sifting through mounds of this evidence; after being instructed by the trial court on the law of embezzlement as it applied to the Petitioner; the jury was then asked to believe that the Petitioner had a good faith excuse. This borders on frivolous. Charging and prosecuting the Petitioner for embezzlement seriously compromised his defense to the tax charges.

After the jury returned a guilty verdict on counts 1-7, the trial court corrected itself in part and granted Petitioner's motion for judgment of acquittal. The trial court

couched this decision on the insufficiency of the evidence, not on the legal impossibility of the self-embezzlement. Petitioner appealed his other convictions on the grounds that the embezzlement counts infected the entire trial, causing prejudicial spillover and depriving him of a fair trial.

C) The Opinion by the Eleventh Circuit Court of Appeals improperly relied on *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000) to analyze the "prejudicial spillover" of the embezzlement counts.

The Eleventh Circuit addressed Petitioner's claim of prejudicial spillover by applying the two-part test set forth in *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000). Under *Prosperi*, prejudicial spillover occurs where "1) evidence was admitted that would not have been but for the dismissed charge; and 2) that evidence was improperly relied on by the jury in their consideration of the remaining charges." *Id.* at 1345; *cf. United States v. Rooney*, 37 F.3d 847 (2nd Cir. 1994).

Employing this test, the Court of Appeals constricted its inquiry to the consideration of evidence that would not have been admitted but for the dismissed embezzlement counts. The Court of Appeals then focused on the second part of the *Prosperi* test: the jury's possible reliance on the otherwise inadmissible evidence. To make this inquiry, the court considered whether the embezzlement evidence was "inextricably intertwined" with the other counts; and whether the jury meticulously sifted the evidence. Satisfied that the evidence was inextricably

intertwined and that the jury sifted meticulously, the Court of Appeals affirmed the trial court's denial of the motion for a new trial.

The Court of Appeals' reliance on *Prosperi* is factually misplaced for three reasons. First, in *Prosperi*, the trial court granted the defendant's motion before submitting the case to the jury. *Prosperi*, 201 F.3d at 1339. This is significant because in *Prosperi* the jury was not instructed on the mail fraud counts by the trial court. Comparatively, in this case, the trial court instructed the jury on the law of embezzlement as it applied to the Petitioner. Secondly, in *Prosperi*, the charges were all similar in nature, i.e. mail fraud, money laundering, counterfeiting, and tax fraud. Here, an income tax case was converted into an embezzlement conspiracy. Lastly, in *Prosperi*, the trial court granted the defendant's motion for acquittal based on the failure of proof – not on the legal fiction of the alleged crimes. *Id.* at 1339. Here, the trial court actually instructed the jury as to the law of embezzlement as it applied to the Petitioner – at the least, an implicit endorsement of the prosecution's theory of self-embezzlement.

Further consideration of the opinion exposes the practical inability of *Prosperi* to effectively address spill-over prejudice. Applying the *Prosperi* analysis to this case, the Court of Appeals found that the jury carefully and meticulously reviewed all the evidence. The Court explained that the jury made distinctions, deliberated for an extended period, and even returned acquittals on the obstruction counts. This "meticulous review" included returning a guilty verdict on the embezzlement counts and a guilty verdict on the CTR violation counts. In short,

this "meticulous review" resulted in convictions on two sets of counts that the Court of Appeals and the trial court concluded no reasonable juror could reach.

The fact that the jury reached the wrong verdict – a verdict that was legally not supported by the evidence – hardly provides an assurance that the jury was able to sift carefully through the evidence. On the contrary, the jury's apparent inability to sift through the evidence and return a not guilty verdict on the two sets of counts, which the trial court and the Court of Appeals found were not supported by the evidence, is the surest sign that the Petitioner was prejudiced by his characterization as a thief and a crook.

D) Existing law addressing prejudicial spillover is deficient and in conflict within the Circuits.

The Second Circuit has pronounced the leading cases addressing prejudicial spillover. In *United States v. Griffith*, 2002 U.S. App. LEXIS 4519, 30 (2nd Cir.), the court reiterated the established test for determining prejudicial spillover:

> "First, we look to whether the evidence that related to the dismissed charges was of a type that would "incite or arouse the jury into convicting the defendant." Second, we examine the similarities and differences between the evidence relating to the dismissed charges and the evidence relating to the remaining charges. Third, we evaluate "the strength of the government's case" on the remaining counts." (*Quoting United States v. Rooney*, 37 F.3d 847, 855 (2nd Cir. 1994)).

The first inquiry, the inflammatory nature of the dismissed charges, is a critical, deliberate facet to a proper analysis of prejudicial spillover. *See United States v. Ivic*, 700 F.2d 51, 65 (2nd Cir. 1983) (whether the evidence on the reversed count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts); *see also United States v. Jones*, 16 F.3d 487, 493 (2nd Cir. 1994) ("prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice" that requires overturning remaining counts.)

However, the Eleventh Circuit has deleted this element. In *Prosperi*, the court articulated the prejudicial spillover test as follows:

> "[A] reviewing court must consider whether the convictions were the result of prejudicial spillover: that is, was there evidence (1) that would not have been admitted but for the dismissed charges and (2) that was improperly relied on by the jury in their consideration of the remaining charges." *Id.* at 1345 (*citing United States v. Rooney*, 37 F.3d 847) (whether the totality of the circumstances requires reversal of some or all of the remaining counts.))

By omitting the first step, *Prosperi* relegates the entire inquiry to that of the admissibility of the evidence – an error that can be rectified by instruction from the court. 201 F.3d 1335, 1345; *see also United States v. Miranda*, 197 F.3d 1357 (11th Cir. 1999) (focusing on the jury's compartmentalization and sifting of the evidence). The net effect of the *Prosperi* analysis is that the prejudicial spillover

inquiry is limited to a study of evidence, which would not have been absent the dismissed charges.

In this case, while certain evidence was admitted that was particular to the embezzlement counts, the body of the prejudice goes to the complexion of the case as a whole: 1) that the Petitioner was labeled something he could not legally be; 2) that this characterization undermined Petitioner's credibility; and 3) that embezzlement charges seriously impaired Petitioner's ability to mount a cogent defense. The analysis employed by the Court of Appeals essentially makes a positive finding of prejudicial spillover dependent upon the admission of otherwise inadmissible evidence. This is in immediate conflict with the test enunciated in *Rooney*: "whether the evidence on the reversed count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts." 37 F.3d 847, 855.

The prejudice to a defendant in having to defend against charges inconsistent with the law is clear. In *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998), the prosecution pursued a theory of bank fraud, which even if true, did not violate the prevailing law in the circuit. Reversing the convictions, the Court in *Adkinson* observed, "Ill-defined charges leave 'the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.' " *Id.* at 1374 (citation omitted). The *Adkinson* Court concluded that the net result of extraneous charges was to irrevocably impair the "ability of these defendants to mount a coherent defense." *Id.* at 1372-1373. While this decision is based upon similar facts, the *Adkinson* decision does not recite an explicit test. *Id.* at 1371-1372.

("[B]ecause the initial inclusion of these allegations, coupled with their subsequent dismissal after the government's case created a unique set of circumstances.")

There is abundant case law that prejudicial evidence can taint a verdict. Calling the defendants thieves, when they are not, is prejudicial. *See, e.g., United States v. Bailey*, 14 F.3d 1557 (11th Cir. 1994) (during argument, the prosecutor stated that the defendant was a professional criminal – there was no evidence that this was so; conviction reversed). The *Bailey* court stressed that describing the defendant as a professional criminal was particularly improper because it sought to brand the defendant as something that he was not, thus unfairly and inaccurately denigrating his character. Moreover, improper evidence offered on one count can taint convictions on other, unrelated counts. *See, e.g., United States v. Eason*, 920 F.2d 731 (11th Cir. 1990) (introduction of inadmissible evidence on one count tainted convictions on all counts, because there was no way to ensure that the jury compartmentalized the improper evidence to the counts for which that evidence was offered). Another analogy would be the improper use of Rule 404(b) evidence. Scores of cases demonstrate that introducing improper evidence may taint a conviction. *See, e.g., United States v. Young*, 39 F.3d 1561 (11th Cir. 1994); *United States v. Mills*, 138 F.3d 928 (11th Cir. 1998); *United States v. Veltmann*, 6 F.3d 1483 (11th Cir. 1993); *United States v. LeQuire*, 943 F.2d 1554 (11th Cir. 1991); *United States v. Stefan*, 784 F.2d 1093 (11th Cir. 1986).

Here, the issue is subtler than the typical Rule 404(b) case. The conduct of cashing checks without depositing

them, or using back haul checks to pay insurance premiums, was admissible to prove the tax counts. That is, the actual transactions themselves were admissible evidence. What prejudiced Petitioner in this case was not the evidence of the transactions so much as the unfair, inaccurate, and court-endorsed characterization of these transactions as being evidence of theft, embezzlement and fraud. By flooding the jury with evidence, argument, and instructions, Petitioner's trial was rendered fundamentally unfair and the jury verdict unreliable.

CONCLUSION

For the above stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8863

D.C. Docket No. 95-00460-1-CR-1-WBH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES B. PRATER,

Defendant-Appellant.

No. 99-13343

D.C. Docket No. 95-00460-CR-3-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM J. PLEMONS, JR.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

(June 6, 2001)

Before BLACK and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

PER CURIAM:

On October 13, 1995, an indictment containing fifty-five counts was returned to the United States District Court for the Northern District of Georgia charging Charles B. Prater, William J. Plemons, Jr., and seven co-defendants with multiple offenses. The District Court severed twenty-six of the counts for a trial which began January 16, 1998 ("Trial I") and the other remaining counts proceeded to trial on February 9, 1999 ("Trial II").[1] At Trial I, Prater and Plemons were found guilty under Counts 8 through 11, charging Plemons, aided and abetted by Prater, with structuring a transaction to avoid reporting requirements in violation of 31 U.S.C. § 5324(a)(3). Also at Trial I, Prater was found guilty under Counts 28, 30, and 32, charging Prater with filing a false tax return in violation of 26 U.S.C. § 7606(1); under Counts 29, 31, and 33, charging Prater with personal tax evasion in violation of 26 U.S.C. § 7201; and under Counts 40, 41, and 43 charging Prater with tax fraud in violation of 26 U.S.C. § 7206(2). At Trial II, Plemons was found guilty under Counts 35, 37, and 39, charging Plemons with personal tax evasion in violation of 26 U.S.C. § 7201.

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] The district court renumbered for convenience at each trial the counts then proceeding to trial. Throughout this opinion, however, the court will utilize the original numbering of the counts from the indictment.

Appellant Prater appeals his convictions under the above-identified thirteen counts (all resulting from Trial I), and he also appeals his sentences under the nine tax counts. Prater raises three issues: whether there was sufficient evidence to support his convictions under Counts 8-11, whether the district court erred in denying his motion for new trial based upon the court allowing Counts 1-7 to remain in the trial through the time of the verdict, thereby prejudicing the jury, and whether the district court erred in enhancing his offense level for the tax offenses under USSG § 2T1.1(b)(2) for the use of sophisticated means. Appellant Plemons appeals his convictions and sentences under the above-identified seven counts (four of which resulted from Trial I and three of which resulted from Trial II). Plemons raises three issues challenging his convictions: whether there was sufficient evidence to support his convictions in Trial II under counts 8-11, whether the district court erred by failing to grant him a mistrial after it dismissed the embezzlement counts as to him when the Government rested in Trial I, and whether the district court erred in Trial II by denying a motion for mistrial which was predicated upon the receipt of evidence under Fed. R. Evid. 404(b). In addition, Plemons raises three issues challenging his sentences: whether the district court erred in sentencing in Trial I by applying USSG § 2S1.3(c) under the structuring counts,[2] whether the district court erred in calculating the tax loss at sentencing in Trial II, and whether the district

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[2] Since the convictions under the structuring counts are being reversed, this issue becomes moot and will not be further discussed.

court erred at sentencing in Trial II by enhancing his offense level for the tax offenses under USSG § 2T1.1(b)(2) for sophisticated concealment.

Because the evidence relating to Counts 8, 9, 10, and 11 was insufficient to support the convictions thereunder, we reverse the convictions and vacate the sentences under those counts. However, we affirm as to all other issues as hereinafter discussed.

I. Factual Background

Charles Prater was the owner and operator (along with co-defendant Warmack who is not involved in this appeal) of Carpet Transport, Inc. ("CTI"). CTI was insured by W.J. Plemons Insurance, Inc. owned by co-defendant William Plemons. CTI, located in Gordon County, Georgia, had approximately 200-500 trucks that delivered carpet around the country from factories in Dalton, Georgia. The allegations in this case stem primarily from a trucking practice known as "back haul." After a truck delivered a load of carpet to the West Coast, the driver would often find another freight load (usually commodities) to be delivered to the East Coast and would "back haul" that freight on the return trip rather than drive back an empty truck. Payments for these back haul deliveries would be made directly to the drivers.[3] CTI derived millions of dollars of annual income from back haul checks as each check might range from $500-$3500

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[3] On the contrary, when carpet was shipped out of Georgia, the new owner of the carpet was invoiced and paid CTI directly by check for those loads.

and drivers brought back over one thousand checks per week.

In Counts 2-7, the Government charged Prater and Warmack, aided and abetted by Plemons, with embezzlement in violation of 18 U.S.C. § 660.[4] The Government established at trial that approximately $3.5 million in backhaul checks made payable to CTI were not deposited in CTI corporate bank accounts. The Government alleged that Prater, who was in charge of operations and backhaul, and Warmack, who handled CTI's administration and carpet delivery, systematically stole those CTI backhaul checks and either cashed them, deposited them in personal accounts, or diverted them to other companies, including the insurance agency owned by co-defendant Plemons. Prater did not record these cashed back haul checks in CTI ledgers and did not inform his accountants that he had received and cashed these checks.

Because many of the back haul checks were cashed at a bank in a manner that allegedly constituted "structuring," Counts 8-11 charged Prater and Plemons with structuring violations under 31 U.S.C. § 5324(1)(3). A bank is required to file a Currency Transaction Report (CTR) with the IRS for each cash transaction involving an amount greater than $10,000. As relevant to this case, "structuring" involves intentionally cashing checks in amounts under the $10,000 reporting requirement by breaking up the cashing transactions. The Government presented evidence that Plemons, at the direction of Prater, cashed

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[4] Prater and Warmack were also charged with a conspiracy to embezzle the back haul checks from CTI in Count 1 under 18 U.S.C. § 371.

numerous revenue checks in bundles that totaled between $9,000 and $10,000, but never exceeded $10,000. Plemons cashed at his own banks, NationsBank and Bank South, checks made out to CTI that Prater had given to him totaling approximately $164,000. Plemons also cashed approximately $305,766 in CTI backhaul checks at "Check-It-Out," a check-cashing service located in Atlanta, Georgia. The Government also attempted to show that Plemons "willfully" structured his transactions to fall under the $10,000 reporting requirements because Plemons "scribbled" his signature on the back of the checks instead of legibly writing his signature and because Plemons, on several occasions, cashed more than one batch of CTI back hauls checks only minutes apart at the same bank.

Furthermore, the Government charged that Prater deposited CTI back haul checks into his personal accounts and Plemons deposited CTI back haul checks into his insurance agency account by crediting the deposits to "client activity accounts." For allegedly diverting CTI money to their personal use, Prater and Plemons were charged with willfully filing false tax returns and evading tax under 26 U.S.C. § 7201 and 7206(1) in Counts 28-33 and in Counts 34-39, respectively. The Government also charged Prater, Plemons, and Warmack in Counts 40-45[5] with tax fraud by willfully failing to report taxable income under 26 U.S.C. § 7206(1) and (2) because CTI did not reflect the backhaul income on its corporate tax return. Finally, the Government alleged that Prater and

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[5] Prater was only charged in Counts 40, 41, and 43. Plemons was only charged in Count 45.

Plemons encouraged certain witnesses to lie to the Government about the financial operations (including the use of cash payments to employees) in violation of 18 U.S.C. § 1512(b)(1); Prater and Plemons were collectively charged with witness tampering in Count 53 while Prater was charged individually with witness tampering in Counts 47-49.

The district court made the decision, against objections by Plemons, to try Plemons, Prater, and Warmack together in Trial I on Counts 1-11, 28-33, 40-44, 47-49, and 53.[6] With respect to the embezzlement counts, Prater's defense was centered on the argument that it is legally impossible to steal from a company that one owns, and thus no embezzlement occurred. The Government countered that a corporation and owners have separate identities, and thus one can embezzle from the other. As Trial I progressed, Plemons unsuccessfully asked the district court to sever him, arguing that the embezzlement counts were inapplicable to him and prejudicial. Plemons now contends that he was wrongfully categorized as a "thief" on several occasions during Trial I and offers as an example the Government's opening statement that "[t]he evidence in this case is going to show the Mr. Plemons, Mr. Prater, and Mr. Warmack have conspired to steal approximately $3.5 million from CTI." Plemons motion for judgment of acquittal on the embezzlement charges was granted after the Government rested. After the jury returned a guilty verdict on those counts as to Prater, the

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[6] Counts 34-39 and 45, involving charges only against Plemons, were severed and were the subject of Trial II as discussed below.

district court also granted Prater's motion for judgment of acquittal. Those counts are not on appeal.

With respect to the structuring counts, the Government presented evidence that Plemons accepted backhaul checks from Prater and negotiated them for cash at banks in his community. Plemons admits that "he clearly structured his [cashing] activities to keep the transactions below the $10,000 [reporting requirement]," but maintain that he did not act willfully in doing so. Prater argued at trial that he did not personally cash any of these checks and that there was no evidence that Prater received any of the cash from those transactions. The Government contended that Prater aided and abetted Plemons because the back haul checks listed in the indictment were checks made out to CTI that Prater gave to Plemons.

With respect to the tax offenses in Trial I, Prater argued that although the back haul checks were unreported income, all of the money derived from the back haul checks was used to fund corporate expenses so there was no underpayment of taxes. Prater reasoned that, although CTI failed to report the income, they also failed to report the off-setting expenses. Prater argued that there was no willful filing of a false return because he believed in good faith that he did not have to report either of the transactions.

The jury returned a guilty verdict in Trial I on March 16, 1998 as to both Appellants[7] on most counts of the

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[7] The jury acquitted Defendant Warmack on all counts.

indictment.[8] Prater was sentenced on June 30, 1998 to forty-one months imprisonment and a fine of $50,000. At Prater's sentencing, the district court, applying the guidelines and over Prater's objection, concluded that the tax offenses qualified for the "sophisticated means" enhancement. Plemons was sentenced to 12 months imprisonment and a fine of $20,000 on July 1, 1998.

On February 9, 1999, Trial II began involving seven remaining counts of the initial indictment[9] charging Plemons alone. At Trial II, the Government attempted to show tax fraud through three separate sources of unreported income: diversions of corporate assets for Plemons' personal expenses; checks from the insurance agency that Plemons misappropriated from his clients; and alleged kickback checks paid to Plemons in an insurance mail fraud scheme. The Government was allowed to introduce testimony relevant to the alleged insurance fraud, over objection from Plemons, in an attempt to demonstrate that Plemons received kickback income; at

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[8] Prater was acquitted on witness tampering (counts 47, 48, and 53). Although Count 49 charging Prater with witness tampering was apparently tried, the criminal docket for Prater does not list a disposition of Count 49. Count 49 is not on appeal. Prater was convicted of the remaining tried counts (Counts 1-11, 28-33, 40-41, and 43). Post-trial, the district court granted Prater's motion for judgment of acquittal as to Counts 1-7.

During trial after the Government rested, the district court granted Plemons' motion for judgment of acquittal as to Counts 1-7. Plemons was acquitted by the jury on the witness tampering count (Count 53) and convicted of willfully structuring transactions (Counts 8-11).

[9] Trial II involved Counts 34-39 and Count 45.

the end of trial the court instructed the jury that the Government had failed as a matter of law to prove that Plemons received any kickbacks as a source of unreported income. The jury returned a guilty verdict in Trial II as to six of the seven counts. The jury acquitted Plemons on Count 45. The court granted Plemons' motion to vacate the convictions on counts 34, 36, and 38 for filing false tax returns, and entered a guilty judgment on counts 35, 37, and 39 for attempt to evade tax. Plemons was sentenced on June 29, 1999 to twenty-seven months, to run concurrently with the twelve-month sentence imposed in trial I. At Plemons' second sentencing, over Plemons' objection, the district court adopted the United States' calculation of tax loss and increased Plemons' offense level to 18 for "sophisticated concealment."

The judgment of conviction and sentence of Prater in Trial I was entered on July 2, 1998 and a timely notice of appeal was filed by Prater on July 2, 1998. The judgment of conviction and sentence of Plemons in Trial I was entered on July 2, 1998 and a timely notice of appeal was filed by Plemons on July 8, 1998. The second judgment of conviction and sentence of Plemons from Trial II was entered on August 21, 1999 and a timely notice of appeal was filed on September 3, 1999. These appeals ensued.[10]

II. Sufficiency of the Evidence under Counts 8-11

Prater and Plemons challenge their convictions under Counts 8-11 for lack of sufficient evidence. Whether there

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[10] This court granted the motion to consolidate the appeal of Prater and the appeals of both of Plemons' sentences.

is sufficient evidence to support a jury verdict is a question of law subject to *de novo* review. *See United States v. Vazquez*, 53 F.3d 1216, 1224 (11th Cir. 1995). We examine the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the guilty verdict. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999). Both Prater and Plemons argue that the jury's verdicts on the structuring counts should be reversed because the verdicts were not supported by the evidence.[11] Appellants rely primarily on *Vazquez*, a case interpreting the "willfulness" element of 31 U.S.C. § 5324 and 5322.[12] 53 F.3d at 1218-1220. *Vazquez* stands for the proposition that even a large amount of circumstantial evidence[13] demonstrating that a defendant "wanted to

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[11] Prater challenges the sufficiency of the evidence to establish that he aided or abetted Plemons in the commission of the structuring offense. Plemons does not challenge the sufficiency of the evidence to establish that he structured cash transactions in order to evade the reporting requirements, but instead claims only that the evidence was insufficient to establish willfulness.

[12] It is illegal under § 5324 to cause or attempt to cause a financial institution to fail to file a report or to structure cash transactions "for the purpose of evading" the filing of a CTR. 31 U.S.C. § 5324(1) & (3). *Vazquez* was decided after *Ratzlaf v. United States*, 510 U.S. 135, 114 S. Ct. 655 (1994). The operative facts in this case occurred in 1992-93, and thus the law applicable to this case is the same that was involved in *Ratzlaf* and *Vazquez*. We note, however, that amended § 5324 now has its own penalty provision so that reliance on 31 U.S.C. § 5322 for a penalty is no longer appropriate. *See Vazquez* at 1218 n.2. To resolve this appeal, however, we have to consider § 5322 which provides a penalty only for a "willful" violation.

[13] The Supreme Court observed in *Ratzlaf* that a jury could find that a defendant knew his structuring activity was illegal

evade the bank's reporting requirements . . . is not adequate to show that [the defendant] knew the law prohibited him from doing so." *Id.* at 1225. Under the statutes existing during the relevant time frame for this case, *Vazquez* required more evidence to establish willfulness, such as testimony by the defendant enabling the jury to question his credibility, reject his explanation, and regard his false testimony as evidence of guilt. *See id.* at 1225-1226. With respect to Plemons, the amount of evidence presented at trial that is relevant to willfulness is considerably less than that evidence present in *Vazquez.* As to Prater, the evidence tending to show willfulness is even less. We also note that neither Plemons nor Prater testified. After a careful review of the record, we find that there was not sufficient evidence to support the convictions of Prater and Plemons on the structuring charges, and therefore we reverse the convictions of Prater and Plemons under Counts 8, 9, 10, and 11 and vacate the sentences imposed under those counts.

III. Additional Prater Issues on Appeal

A. Denial of Motion for New Trial

After the jury returned a guilty verdict on several counts of the indictment against Prater, Prater moved for judgment of acquittal, or, in the alternative, a new trial. Prater's motion for judgment of acquittal on Counts 1-7

"by drawing reasonable inferences from the evidence of defendant's conduct." 510 U.S. at 149, 114 S. Ct. at 663 n. 19; *see also United States v. Macko,* 994 F.2d 1526, 1533 (11th Cir. 1993) ("Circumstantial evidence may prove knowledge and intent.").

(the "embezzlement counts") was granted, but his motion for judgment of acquittal and new trial was denied as to the remaining counts for which he was convicted. Prater now asserts that the district court should have dismissed Counts 1-7 earlier in the proceedings because the jury was unfairly prejudiced by the admission of evidence relating to those counts and the prosecution's characterization of Prater as an embezzler, which Prater asserts prevented him from receiving a fair trial on the remaining counts. Prater contends that, because of that "spillover prejudice," the district court erred by denying his motion for new trial as to the remaining convictions. We review a district court's denial of a motion for new trial under an abuse of discretion standard. *See United States v. Michael*, 17 F.3d 1383, 1384 (11th Cir. 1994).

Dismissal of some counts in an indictment does not, in itself, warrant reversal of convictions on other counts of the indictment. *See United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000). This court must determine whether the convictions were the result of "prejudicial spillover" meaning, (1) there was evidence that would not have been admitted but for the dismissed charges, and (2) that evidence was improperly relied upon by the jury in their consideration of the remaining charges. *See id.* In evaluating the second aspect of that analysis, we consider several factors that would indicate whether prejudice tainted the jury's verdict. *See id.* at 1346. "First, we consider whether the jury meticulously sifted the evidence admitted for all counts. . . . Second, we examine whether the contested evidence was inflammatory in nature, and thus liable to prejudice the jury. . . . Third, we

consider whether admission of the other evidence significantly altered the defendant's trial strategy. . . . Finally, we assess the strength of the evidence against the defendant on the remaining counts." *See id.* (noting that "[a] discriminating acquittal also can signal that the jury was able to sift through the evidence properly") (citations omitted). We agree with the Government that the evidence on the dismissed embezzlement counts was inextricably intertwined with the evidence on the tax and structuring counts and would have been admissible even if the dismissed counts had never been charged. *See* Fed. R. Evid. 404(b). Further, the jury had ample opportunity to sift through the evidence carefully. The number of days that it took to reach a verdict and the fact that the jury acquitted one defendant of all charges and the other defendants of certain charges satisfies us that a meticulous sifting occurred. After a careful consideration of the arguments and the evidence, we do not find that the district court abused its discretion by denying Prater's motion for new trial as to the remaining convictions.

B. Sophisticated Means Enhancement

When reviewing a sentence, this Court reviews factual determinations for clear error and reviews the district court's application of the Sentencing Guidelines to those facts *de novo*. *See United States v. Jamieson*, 202 F.3d 1293, 1295 (11th Cir. 2000). Any rulings of law made by the district court in conjunction with the sophisticated means enhancement we review *de novo*. *See United States v. Barakat*, 130 F.3d 1448, 1456 (11th Cir. 1997). Prater contends that the district court erred by enhancing his offense level for the tax offenses under Section 2T1.1(b)(2)

of the Sentencing Guidelines for the use of sophisticated means. Section 2T1.1(b)(2), as in effect prior to a 1998 amendment, provided for a 2-level enhancement "[i]f sophisticated means were used to impede discovery of the existence or extent of the offense." USSG § 2T1.1(b)(2) (1997). "Sophisticated means" is defined as "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." USSG § 2T1.1, cmt. n.4 (1997). The district court found that Prater "layered" transactions for the purpose of concealment and thus that Prater's tax offenses involved sophisticated methods of concealing the existence and extent of the offenses. After a careful review of the record, we do not find that the district court erred in sentencing Prater by applying the 2-level enhancement for sophisticated means.

IV. Additional Plemons Issues on Appeal

A. Denial of Motion for Mistrial in Trial I

After the Government rested, Plemons moved for judgment of acquittal and once the district court granted Plemons' motion for judgment of acquittal on Counts 1-7, Plemons moved for a mistrial as to the remaining counts, which the district court denied. Plemons contends that the district court should have granted him a mistrial as to the remaining counts because the majority of the Government's evidence, while irrelevant to the remaining counts, was substantially prejudicial to Plemons and undermined his right to a fair trial. We review a district court's denial of a motion for mistrial for abuse of discretion. *See United States v. Trujillo*, 146 F.3d 838, 845 (11th

Cir. 1998). For the same reasons that found Prater's arguments on this issue unconvincing,[14] we find that Plemons' contentions do not rise to the level of abuse of discretion in this case.

B. Denial of Motion for Mistrial in Trial II

As noted earlier, we review a district court's denial of a motion for mistrial for abuse of discretion. *See United States v. Trujillo,* 146 F.3d 838, 845 (11th Cir. 1998). Plemons contends that the district court erred by denying his motion for mistrial in Trial II after admitting evidence of an insurance fraud scheme. Relying on *United States v. Utter,* 97 F.3d 509 (11th Cir. 1996), Plemons asserts that such evidence was extrinsic to the charged offenses and should have been excluded under Fed. R. Evid. 404(b) because the Government failed to establish that Plemons actually committed the fraud. The Government maintains that even though evidence of the insurance fraud scheme was admitted, the district court informed the jury that the Government failed to prove the scheme and instructed the jury to disregard any evidence relating to that fraud. In *Trujillo,* we held that, "[w]hen a district court issues a curative instruction, we will reverse only if the evidence 'is so highly prejudicial as to be incurable by the trial court's admonition.' " 146 F.3d at 845 (reviewing a district court's refusal to grant a mistrial after the admission of potentially prejudicial evidence and prosecutorial statements). In this case, the instruction given by the district

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[14] The argument presented by Prater and Plemons regarding "prejudicial spillover" from Counts 1-7 are substantially similar. *See* discussion *supra* Part III. A.

court was adequate to cure any potential prejudice[15] and thus the district court did not abuse its discretion in denying Plemons' motion for a mistrial.

C. Calculation of Tax Loss in Trial II

We review a district court's factual findings for clear error. *See United States v. Lewis*, 115 F.3d 1531, 1536 (11th Cir. 1997). Appellant Plemons maintains that the district court erroneously calculated tax loss in sentencing him for the personal tax evasion offenses in Trial II. USSG § 2T1.1 directs that the base level offense of a defendant convicted under 26 U.S.C. § 7201 is determined by calculating the tax loss that the defendant intended to cost the government. "If the offense involved filing a tax return in which gross income was under reported, the tax loss shall be treated as equal to 28% of the unreported gross

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[15] Before closing argument, the court instructed the jury:

> In its opening statement, the Government contended that Mr. Plemons had three sources of unreported income, diversion of corporate assets, misappropriation of premium overpayments, and kickbacks paid in exchange for Mr. Plemons's efforts to lower insurance premiums. I instruct you now that the Government has failed as a matter of law to prove that Mr. Plemons received any kickbacks as a source of unreported income. In your consideration of the evidence, you should disregard any evidence regarding the preparation of two financial statements for Carpet Transportation Incorporated, and the submission of those two statements to the Reliance Insurance Company and Midwest Employees Casualty Company for the purpose of calculation of premiums.

income." USSG § 2T1.1(c)(1)(A). Plemons maintains that the district court erred by including in the tax loss calculation part of the amount reported as "Loans to Stockholder" on the 1993 income tax return filed by Plemons' corporation. Out of the $538,000 amount listed on the 1993 return as "Loans to Stockholder," the district court concluded that $377,000 of the claimed amount was not, in fact, a loan from the corporation and thus was attributable to Plemons as unreported income that constituted a tax loss to the Government. Plemons contends that because the jury acquitted him of Count 45 (filing a false corporate tax return for 1993), and thus did not conclude that the "Loans to Stockholder" figure on the 1993 return was falsely reported, the district court should have reduced the total amount of unreported income that Plemons allegedly diverted from the corporation by the total amount listed as "Loans to Stockholder" on the 1993 return. The Supreme Court has clearly held, however, that the sentencing court may consider conduct of which the defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence. *See United States v. Watts*, 519 U.S. 148, 149, 117 S. Ct. 633, 634 (1997). After a careful review of the evidence presented in this case, we find that the district court could have found by a preponderance of the evidence that part of the amount reported on Plemons' 1993 corporate tax return as "Loans to Stockholder" was false and that the diverted income disguised as loans was includable in the tax loss calculation.

D. Sophisticated Concealment Enhancement in Trial II

When reviewing a sentence, this court reviews factual determinations for clear error and reviews the district court's application of the Sentencing Guidelines to those facts *de novo*. *See United States v. Jamieson*, 202 F.3d 1293, 1295 (11th Cir. 2000). Any rulings of law made by the district court in conjunction with the sophisticated means enhancement we review *de novo*. *See United States v. Barakat*, 130 F.3d 1448, 1456 (11th Cir. 1997). Plemons, like Prater, contends that the district court erred when it enhanced his offense level for the tax offenses under Section 2T1.1(b)(2) for "sophisticated concealment," as amended November 1, 1998 (formerly titled "sophisticated means"). "Sophisticated concealment" is defined as "especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect." USSG § 2T1.1, cmt. n.4 (1998). After a careful review of the record, we do not find that the district court erred in sentencing Plemons by applying the 2-level enhancement for sophisticated means.

V. Conclusion

Accordingly, the convictions of Prater and Plemons under Counts 8, 9, 10, and 11 are reversed and the sentences imposed under those counts are vacated. The convictions and sentences under Counts 28, 29, 30, 31, 32, 33, 40, 41, and 43 as to Prater, and under Counts 35, 37, and 39 as to Plemons are affirmed.

AFFIRMED IN PART; REVERSED IN PART; and VACATED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8863-DD & 99-13343-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES B. PRATER,
WILLIAM J. PLEMONS, JR.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Jan. 16, 2002)

Before: BLACK and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE